Supreme Court, U.S.
FILED

00-228 AUG - 7 2000

OFFICE OF THE CLERK

No. _____

In The Supreme Court of the United States

MARGARET A. BAGLEY, WARDEN,
Petitioner,

v.

FREDERICK WHITE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

BETTY D. MONTGOMERY
Attorney General of Ohio
EDWARD B. FOLEY*
State Solicitor
**Counsel of Record*
DAVID M. GORMLEY
Associate Solicitor
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-8980

28pp

QUESTION PRESENTED

Whether the States are required by the Sixth and Fourteenth Amendments to provide effective post-appeal counsel to indigent criminal defendants so that those defendants can challenge the work of their original appellate lawyers after the first-appeal-of-right is finished.

TABLE OF CONTENTS

Opinions Below 1

Jurisdiction 2

Constitutional And Statutory Provisions Involved 2

Introduction 3

Statement 5

1. State court proceedings 5
2. Federal habeas proceedings 8

Reasons For Granting The Petition 10

1. The Sixth Circuit's decision is inconsistent with *Coleman* 12
2. Under the guise of interpreting state law, the court of appeals has significantly expanded the Sixth Amendment right to counsel 14
3. Other courts of appeals have resolved the question differently 17
4. The decision of the court of appeals will eviscerate this Court's decision in *Edwards v. Carpenter* 20

Conclusion 22

(The Appendix is printed in a separate booklet.)

TABLE OF AUTHORITIES

Cases:

Bannister v. Delo, 100 F.3d 610 (8th Cir. 1996), *cert. denied*, 521 U.S. 1126 (1997) 19

Bonin v. Vasquez, 999 F.2d 425 (9th Cir. 1993) 16-17

Coleman v. Thompson, 501 U.S. 722 (1991) ..... *passim*

Demarest v. Price, 130 F.3d 922 (10th Cir. 1997) 18

Edwards v. Carpenter, 120 S. Ct. 1587 (2000) 6, 20, 21

Fairman v. Anderson, 188 F.3d 635 (5th Cir. 1999) 19

Hill v. Jones, 81 F.3d 1015 (11th Cir. 1996), *cert. denied*, 519 U.S. 1119 (1997) 17

Jones v. Johnson, 171 F.3d 270 (5th Cir. 1999), *cert. denied*, 120 S. Ct. 29 (1999) 18

Mackall v. Angelone, 131 F.3d 442 (4th Cir. 1997) (*en banc*), *cert. denied*, 522 U.S. 1100 (1998) 16

Murray v. Carrier, 477 U.S. 478 (1986) 9, 12, 17

Murray v. Giarratano, 492 U.S. 1 (1989) 16

Nolan v. Armontrout, 973 F.2d 615 (8th Cir. 1992) 16

Ortiz v. Stewart, 149 F.3d 923 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 1777 (1999) 18

Pennsylvania v. Finley, 481 U.S. 551 (1987) 13, 16

Reed v. Ross, 468 U.S. 1 (1984) 12

Rehbein v. Clarke, 94 F.3d 478 (8th Cir. 1996) 18

Ross v. Moffitt, 417 U.S. 600 (1974) 13

State v. Murnahan, 584 N.E.2d 1204 (Ohio 1992) 6

State v. Robinson, 660 N.E.2d 472 (Ohio 1996) 14

State v. Sproat, 656 N.E.2d 342 (Ohio 1995) 14

State v. Wilson, 684 N.E.2d 1221 (Ohio 1997) 19

Steward v. Gilmore, 80 F.3d 1205 (7th Cir. 1996) 18

Tower v. Phillips, 7 F.3d 206 (11th Cir. 1993) 18-19

Tredway v. Farley, 35 F.3d 288 (7th Cir. 1994), *cert. denied*, 513 U.S. 1129 (1995) 19

Wainwright v. Sykes, 433 U.S. 72 (1977) 12

Weeks v. Angelone, 176 F.3d 249 (4th Cir. 1999), *aff'd. on other grounds*, 120 S. Ct. 727 (2000) 18

White v. Ohio, 516 U.S. 892 (1995) 8

Yakus v. United States, 321 U.S. 414 (1944) 19

Constitution, statutes and rules:

U.S. Const.:
Amend. VI .....*passim*
Amend. XIV.....2, 13

28 U.S.C. 1254(1).....2
28 U.S.C. 2254 .....2, 8

Ohio App. R. 26(B) .....*passim*

Ohio S. Ct. Rules of Prac., Rule II, Sec. 2(A)(4)(b) 15

In the Supreme Court of the United States

No. _____

MARGARET A. BAGLEY, WARDEN,
Petitioner,

v.

FREDERICK WHITE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Attorney General of Ohio, on behalf of Margaret A. Bagley, Warden of the Mansfield Correctional Institution, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 201 F.3d 743. The opinion of the district court (Pet. App. 25a-27a) is unreported. The report and recommendation of the magistrate judge (Pet. App. 28a-43a)

is unreported. The opinion of the Ohio Supreme Court (Pet. App. 44a-47a) is reported at 647 N.E.2d 787. The opinion of the Ohio court of appeals (Pet. App. 48a-54a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 2000. The court of appeals denied a petition for rehearing on May 10, 2000. Pet. App. 23a-24a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense."

2. The Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any state deprive any person of life, liberty, or property, without due process of law."

3. The relevant provisions of the federal habeas statute, 28 U.S.C. 2254, provide:

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in

custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

4. Rule 26(B)(1) of the Ohio Rules of Appellate Procedure provides in relevant part: "A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time."

INTRODUCTION

This petition presents an important question about the Sixth Amendment on which the circuit courts of appeals are now divided. In its published decision in this case, the Sixth Circuit held that criminal defendants have a federal constitutional right to the effective assistance of counsel to raise claims of ineffective-assistance-of-appellate-counsel on their behalf in state courts. That decision will have profound effects on state criminal justice systems in the Sixth Circuit, for suddenly the States there must provide a new round of government-paid and constitutionally-effective legal services

to prisoners who want to keep fighting their convictions after losing a first-appeal-of-right in state court.

While the extension of those free and effective legal services to state prisoners might well be an admirable policy goal for lawmakers, nothing in the Sixth Amendment or this Court's prior decisions suggests that the States are obligated by the words of the Constitution to provide ongoing legal help to prisoners after the first-appeal-of-right is over. Yet that is now the law in the Sixth Circuit, and those prisoners who do not receive that free and effective legal help from their lawyers after the first-appeal-of-right is over may now, like the convicted murderer in this case, claim that the States have deprived them of a constitutional right, thereby perhaps springing open the jailhouse door years after their convictions were affirmed in state court.

That decision now merits review, for it stands squarely at odds with this Court's decisions limiting the reach of the Sixth Amendment (guaranteeing accused persons the assistance of counsel in "all criminal prosecutions") to a criminal defendant's trial and first-appeal-of-right only. Even apart from the expense that this expansion of the Sixth Amendment's scope will impose on the affected States, the decision has now opened a new avenue for state prisoners to secure federal habeas review of defaulted claims, for now when a prisoner's lawyer flouts a State's rules for raising federal constitutional claims in state court after the first-appeal-of-right is finished – as happened here – the prisoner is free to claim in federal habeas that the State had a constitutional obligation to provide him with an effective lawyer to keep fighting on his behalf after the first-appeal-of-right was lost, and so the prisoner cannot be blamed for missing the State's post-appeal deadlines.

That approach shows none of the "respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus," *Coleman v. Thompson*, 501 U.S. 722, 726 (1991), for it recognizes a right to counsel after the first-appeal-of-right, even though Ohio has never recognized such a right in its own statutes, rules or Constitution, and even though no other federal court has ever done so either. Though this Court has in the past "declined to extend the right to counsel beyond the first appeal of a criminal conviction," *id.* at 756, the Sixth Circuit has now stretched the Sixth Amendment's words to recognize that very right – a new open-ended right to a free round of post-appeal litigation for all criminal defendants. Because this errant approach will now let this defendant and those like him in the future undo a conviction because of errors committed by a lawyer *years* after the defendant's trial and first appeal were over – an approach we think is simply not compelled by the Sixth Amendment – we respectfully ask the Court to grant certiorari in this case.

STATEMENT

1. State court proceedings. Respondent Frederick White was convicted and sentenced by an Ohio trial court in 1989 for the crimes of aggravated murder and felonious assault. Those charges stemmed from the shooting death of White's ex-wife as she and a co-worker stepped out of the nursing home where she worked as a nurse's aide. After a jury found White guilty, the state trial court sentenced him to a lengthy prison term.

White appealed (through counsel), raising seven separate challenges to his convictions. Among other claims, he argued that the photo array shown to two witnesses was unduly suggestive, and said that the prosecutor had

improperly introduced some evidence. The Ohio court of appeals shortened White's sentence by vacating one of his two felonious assault convictions, but otherwise affirmed White convictions and sentences. *See* 1991 WL 8581 (January 31, 1991). White did not appeal this decision to the Ohio Supreme Court.

On July 1, 1993, Rule 26(B) of the Ohio Rules of Appellate Procedure took effect. (This same rule gave rise to the procedural default issue resolved last term in *Edwards v. Carpenter*, 120 S. Ct. 1587 (2000)). The relevant portion of that rule is reproduced on page 3 of this petition. The Ohio Supreme Court adopted that rule after holding that in Ohio, a claim of ineffective assistance of *appellate* counsel must be raised not in a state trial court, but rather through an application for reconsideration filed in the state court of appeals. *State v. Murnahan*, 584 N.E.2d 1204 (Ohio 1992). The 1993 rule, which still governs ineffective-assistance-of-appellate-counsel claims in all non-capital criminal cases in Ohio, gives defendants 90 days – starting with the date on which the court of appeals files its judgment in the defendant's original state-court direct appeal – to raise such ineffective-assistance claims.

On February 16, 1994 – over seven months after the new 90-day rule took effect, and over three years after the Ohio court of appeals had completed its review of his case – White (through new counsel) filed a Rule 26(B) ineffective-assistance-of-appellate-counsel claim with the Ohio court of appeals. White alleged that his appellate counsel in his original appeal in 1989-91 had provided ineffective assistance by failing to describe various challenges to his convictions as *federal* constitutional claims. White's Rule 26(B) application cited various trial-court errors, such as prosecutorial misconduct and the improper admission of

other-acts evidence, hearsay statements and extrinsic evidence, and argued that his original appellate counsel had not effectively pressed those issues in the first appeal, because while the original lawyer had raised all of those claims, he had framed them as violations of state law, rather than federal law.

As for the untimeliness of the Ohio Rule 26(B) ineffective-assistance-of-appellate-counsel claim, White's new counsel explained in an affidavit accompanying the Rule 26(B) application that he had been assigned to White's case in 1991 after White lost his appeal in the state court of appeals, but the heavy workload of the state public defender's office – where White's new lawyer worked – had prevented him from filing the Rule 26(B) application until February 1994. Pet. App. 9a, 49a.

On October 19, 1994, the state court of appeals dismissed White's Rule 26(B) application, finding that White had missed the 90-day window for filing such a claim once that rule took effect on July 1, 1993. Pet. App. 48a-54a. The appeals court found that White's reason for filing a late request to reopen his direct appeal – the heavy workload of his post-appeal counsel – was not "good cause" for his untimely application in 1994. Pet. App. 50a. (The Ohio rule allows state prisoners to file after the 90-day deadline, but only if they show "good cause" for running late.)

In addition, the state court of appeals concluded that White's application, even had it been timely filed, raised claims that his original appellate lawyer had already properly raised in White's original appeal. All of those claims – from the other-acts evidence, to the hearsay statements, to the extrinsic evidence used to impeach White's character, to the claim of prosecutorial misconduct – had been raised by

White's original appellate counsel, and had been addressed in the 1991 opinion of the court of appeals. White's ineffective-assistance-of-appellate-counsel claim was therefore barred not only by the Rule 26(B) provision requiring that it be filed much sooner than it had been, but also by the doctrine of *res judicata*, and the state court of appeals explained both reasons for dismissing White's Rule 26(B) application in its 1994 decision doing just that. Pet. App. 50a-52a.

White appealed, but the Ohio Supreme Court affirmed the dismissal of his Rule 26(B) application in a one-sentence *per curiam* opinion, citing the "reasons stated in [the court of appeals's] opinion." Pet. App. 45a. This Court then denied White's petition for certiorari. *White v. Ohio*, 516 U.S. 892 (1995).

2. Federal habeas proceedings. On December 27, 1995, White filed a petition for a writ of habeas corpus under 28 U.S.C. 2254 in federal district court. He alleged four grounds for habeas relief: prosecutorial misconduct at his trial, the improper admission of other-acts and extrinsic evidence, the improper admission of hearsay statements, and the ineffective assistance of his appellate counsel. As part of that fourth claim, White argued that Ohio's method for raising an ineffective-assistance-of-appellate-counsel claim is unconstitutional.

A U.S. magistrate judge determined that White had procedurally defaulted his claims by failing to appeal to the Ohio Supreme Court once he lost his original direct appeal in the state court of appeals in 1991, and by failing to comply with the 90-day requirement for raising his ineffective-assistance claim under Ohio Appellate Rule 26(B) in 1993-94. Pet. App. 36a-38a.

Applying the cause and prejudice test to those defaults, the magistrate judge refused to treat the heavy workload of White's counsel in the state public defender's office from 1991 to 1994 as the kind of "objective factor external to the defense," Pet. App. 41a, quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986), that could excuse White's failure to comply with Ohio's deadlines for seeking discretionary review in the Ohio Supreme Court of an adverse judgment, or for raising an ineffective-assistance-of-appellate-counsel claim under Rule 26(B). Absent a showing of cause for the default of White's habeas claims, the magistrate judge recommended that all of those claims be dismissed as procedurally barred. Pet. App. 42a.

The district court adopted the magistrate judge's recommendations in full on August 14, 1997, dismissing White's habeas petition because he had procedurally defaulted on his claims in state court, and could not show cause for the defaults. Pet. App. 26a.

White appealed. On January 26, 2000, the Sixth Circuit held that Rule 26(B) was "clearly applicable" to White's claims, Pet. App. 12a – he had argued otherwise because the rule did not take effect until two years after his direct appeal had ended in 1991 – and the Sixth Circuit also concluded that Ohio's state courts had relied on White's failure to comply with that rule's 90-day deadline as the reason for denying his claims. *Id.* at 13a-14a.

Even so, the Sixth Circuit concluded that White could show cause for his procedural default, because the heavy workload of his new lawyer excused White's failure to meet the 90-day deadline in Ohio's Rule 26(B), according to the Sixth Circuit. *Id.* at 17a. Acknowledging that state prisoners have no right to counsel during state post-conviction

proceedings, the Court treated Ohio's Rule 26(B) procedure not as a post-conviction process, but rather as a "continuation of activities related to the direct appeal itself." *Id.* at 19a.

Therefore White, according to the Sixth Circuit, had a constitutional right to the assistance of counsel in filing his Rule 26(B) application in 1993-94 challenging the work of his original appellate lawyer in 1989-91. "The failure of the Ohio Public Defender to offer such constitutionally-mandated counsel excuses the failure of the petitioner to abide by the timing requirements of the applicable procedural rules." *Id.* at 19a. The court of appeals then remanded White's habeas case to the district court, directing that court to consider whether White had been prejudiced by his state-court procedural default of the ineffective-assistance claim, and if so, to review and grant habeas relief on the merits of that claim. The court of appeals has stayed issuance of the mandate in the case pending this Court's action on this petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

The court of appeals, despite this Court's express decisions holding otherwise, has created a new constitutional right to the effective assistance of counsel in state post-conviction proceedings, and has now allowed the errors of post-conviction counsel to excuse in federal habeas a prisoner's failure to comply with a State's independent and adequate procedural rule for presenting post-conviction claims in state court. Badly misreading and misapplying this Court's precedents of the past two decades, the court of appeals has opened a new avenue for state prisoners to secure federal review of defaulted claims, despite the failure of their state post-conviction lawyers to comply with state procedural rules.

That decision will allow prisoners (and their post-conviction lawyers) to flout the States' rules, and then run to federal court and there raise the defaulted claims anew, despite having "deprived the state courts of an opportunity to address those claims in the first instance." *Coleman v. Thompson*, 501 U.S. 722, 732 (1991). The court of appeals has, in short, reached the merits of a federal constitutional claim in habeas that this Court could not reach on direct review, for undeniably Ohio's state courts dismissed the ineffective-assistance claim in this case on state procedural grounds rather than on the merits. No other court of which we are aware has previously suggested that the missteps of state-court post-conviction counsel can revive a claim that was defaulted during a prisoner's collateral attack on his conviction – when he had no right to a lawyer at all – and surely this Court has never done so.

Though Frederick White, the habeas petitioner in this case, procedurally defaulted his ineffective-assistance-of-appellate-counsel claim, the Sixth Circuit has now revived that claim, letting White's lawyer point to the lawyer's own heavy workload as his excuse for missing the deadline to collaterally attack the final judgment entered in White's direct appeal. That decision "ignores the State's legitimate reasons for holding the prisoner," and, if left to stand, "offers state prisoners whose custody [i]s supported by independent and adequate state grounds an end run around the limits of this Court's jurisdiction and a means to undermine the State's interest in enforcing its laws." *Coleman*, 501 U.S. at 731-32. Review by this Court is therefore warranted, for the decision of the court of appeals runs counter to this Court's own long-settled precedents, and is also inconsistent with the approach followed by every other court of appeals that has considered whether errors committed by a criminal defendant's counsel

can serve as cause for a procedural default when those attorney errors were committed long after the prisoner's first-appeal-of-right was finished.

1. The Sixth Circuit's decision is inconsistent with *Coleman*. The court of appeals at least agrees that the States are permitted to enforce a host of procedural rules to regulate their criminal trials and appeals. As this Court has said, such rules "serve vital purposes at trial, on appeal, and on state collateral attack," *Murray v. Carrier*, 477 U.S. 478, 490 (1986), for they "channel[], to the extent possible, the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently." *Reed v. Ross*, 468 U.S. 1, 10 (1984).

And all can agree as well that federal habeas petitioners who have not complied with those State rules may nonetheless secure federal habeas review of a constitutional claim by showing both "cause" for and "prejudice" from the procedural default as described in *Wainwright v. Sykes*, 433 U.S. 72 (1977), and its progeny. Even further, the Court has already held that constitutionally ineffective assistance of counsel may serve as cause for the procedural default of a habeas claim – as long as the prisoner had a constitutional right to the assistance of counsel at the stage of proceedings where the ineffective lawyer made his misstep. *See Carrier*, 477 U.S. at 489 ("a claim of ineffective assistance . . . may be used to establish cause for a procedural default").

But the Court has never said, as did the court of appeals in this case, that state prisoners have a "federal constitutional right to effective assistance of counsel" to challenge the work of their original appellate lawyers. Pet. App. 22a. This purported constitutional right is now one that appears to apply only in the Sixth Circuit, for we are aware of

no other federal circuit court that has recognized a similar right in other States. When a state prisoner's "constitutionally-mandated counsel" in the Sixth Circuit fails "to abide by the timing requirements of applicable procedural rules" for raising a collateral attack on the work of the prisoner's original appellate lawyer in the first-appeal-of-right, *id.* at 19a, that post-appeal attorney error may now serve as the cause for the prisoner's procedural default in his State's courts in the four States of the Sixth Circuit, even though state prisoners in *other* circuits, like all federal prisoners, cannot force the government to provide them with the same "constitutional" right to a new lawyer after the first-appeal-of-right is lost.

This newly-minted constitutional right for state prisoners to an extra round of government-provided effective counsel after the first-appeal-of-right has ended has no roots in any decisions of this Court. Indeed, the Court has said just the opposite, explaining that state prisoners have no constitutional right to the effective assistance of counsel at all once their first-appeal-of-right is finished. *See Coleman*, 501 U.S. at 756 ("We held in *Ross [v. Moffitt*, 417 U.S. 600 (1974),] that neither the fundamental fairness required by the Due Process Clause nor the Fourteenth Amendment's equal protection guarantee necessitated that States provide counsel in state discretionary appeals where defendants already had one appeal as of right."); *id.* ("Similarly, in [*Pennsylvania v.*] *Finley*, [481 U.S. 551 (1987),] we held that there is no right to counsel in state collateral proceedings after exhaustion of direct appellate review.").

White's first-appeal-of-right ended in 1991 when the state court of appeals affirmed his convictions – long before the attorney error and delay at issue here took place in 1993-94 when White and his new post-appeal lawyer defaulted on

the Rule 26(B) deadline. Yet under the Sixth Circuit's *reading* of the Constitution, White's Sixth Amendment right to effective-counsel-at-state-expense continued long after the state court of appeals affirmed his convictions in 1991, and entitled him to a better lawyer than the one who represented him after he lost that first-appeal-of-right. That decision goes well beyond anything we find in the Sixth Amendment, and seems to read that provision as requiring that prisoners always be given a new lawyer to challenge the work of their last one – a perpetual loop without end.

2. Under the guise of interpreting state law, the court of appeals has significantly expanded the Sixth Amendment right to counsel. White will surely respond with an argument that the Ohio Appellate Rule 26(B) process is part and parcel of the first-appeal-of-right (as the Sixth Circuit determined in this case), that he is of course entitled by the Sixth Amendment to a lawyer throughout the first-appeal-of-right, and therefore the Sixth Circuit's holding that he was entitled to the assistance of an effective lawyer in filing a timely Rule 26(B) application is neither remarkable nor path-breaking. He will say that we improperly characterize the Rule 26(B) process as "post-conviction" or "post-appeal," rather than as part of the first-appeal-of-right itself.

He is wrong. It is true, of course, that we view the Rule 26(B) process (under which state prisoners can raise ineffective-assistance-of-appellate-counsel claims) as a post-conviction proceeding, but only because the Ohio Supreme Court – which wrote the Rule – has done so. *See State v. Robinson*, 660 N.E.2d 472 (Ohio 1996) (calling the Rule 26(B) process a "civil, post-conviction matter"); *State v. Sproat*, 656 N.E.2d 342 (Ohio 1995) (same). The Ohio Supreme Court's own rules for appeals in that Court

reinforce the point, referring to "appeals involving postconviction relief, including appeals brought pursuant to . . . App. R. 26(B)." Rule II, Sec. 2(A)(4)(b) of the Ohio Supreme Court's Rules of Practice.

If Ohio's or any other State's process through which state prisoners can challenge the work of their original appellate lawyers is itself part of the first-appeal-of-right, why is it that no State, including Ohio, has ever been required – by the Constitution, by the federal courts, or by state rules or state courts – to provide effective counsel to state prisoners during that process, until now? The Sixth Circuit, inventing this new constitutional right out of whole cloth, has now called into question every state appellate-court judgment affirming a criminal conviction over the past several decades, for until now, no State has ever thought it had a constitutional obligation to provide a new constitutionally-effective lawyer at state expense to every state criminal defendant whose conviction is affirmed in the first-appeal-of-right. Neither Ohio nor any other State has taken on that expensive and burdensome duty of providing two free sets of appellate lawyers to every indigent prisoner (with the second lawyer expressly charged with the duty of challenging the work of the first), yet that is the very result compelled by the Sixth Circuit's decision.

And where will this new constitutional right end, for if this new "constitutionally-mandated counsel," Pet. App. 19a, likewise fails to provide effective assistance to the prisoner, does the Constitution mandate that a third appellate lawyer be provided to the prisoner to challenge the work of the first two? That third layer of constitutionally-mandated appellate lawyering for every prisoner does not seem warranted by the Sixth Amendment, but then neither did that second layer until the Sixth Circuit so decreed.

The Sixth Circuit has simply invented a new constitutional right where none exists. This Court has long-since rejected the argument that state prisoners are entitled to the assistance of counsel in civil, post-conviction proceedings. *See Coleman*, 501 U.S. at 755; *Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (plurality opinion); *Pennsylvania v. Finley*, 481 U.S. 551, 556-57 (1987). The approach of the court of appeals is squarely at odds with those decisions, and simply cannot be reconciled with *Coleman* in particular, where, as here, the state prisoner argued "that it was his attorney's error that led to the late filing of his state habeas appeal." *Coleman*, 501 U.S. at 752. Rejecting that argument, the Court explained that because "[t]here is no constitutional right to an attorney in state post-conviction proceedings . . . this case is at an end," for "counsel's ineffectiveness will constitute cause only if it is an independent constitutional violation." *Id.* at 752, 755. That is, the very argument advanced by the prisoner here and adopted by the court of appeals – that the errors of state post-conviction or post-appeal counsel may excuse a prisoner's procedural default in state court – was expressly rejected by the Court in *Coleman*.

While this Court declined in *Coleman* to "answer . . . broadly" the question whether there is a right to counsel in those post-conviction proceedings that offer a prisoner his *first* opportunity to raise a constitutional claim in state court, *Coleman*, 501 U.S. at 755, and while other courts of appeals that have addressed that question have uniformly declined to create any such exception to *Finley*,[1] the court of appeals in

[1] *See, e.g., Mackall v. Angelone*, 131 F.3d 442, 449 (4th Cir. 1997) (*en banc*), *cert. denied*, 522 U.S. 1100 (1998); *Nolan v. Armontrout*, 973 F.2d 615, 617 (8th Cir. 1992); *Bonin v. Vasquez*,

this case never even considered the question reserved in *Coleman*, and instead ruled contrary to the holding of *Coleman* itself, for the Sixth Circuit's opinion suggests that *any* errors of counsel after the first-appeal-of-right is over can excuse a state-court procedural default in state post-appeal proceedings, whether the prisoner enjoyed earlier state-court opportunities in his direct appeal to raise the claim or not.

In holding that White could show "cause" for his failure to comply with the 90-day deadline in Rule 26(B) for raising his ineffective-assistance claim in Ohio's courts (by pointing to "the failure of his attorney to file that pleading in compliance with the rule," Pet. App. 17a), the court of appeals simply ignored this Court's language in *Coleman*: "Attorney ignorance or inadvertence [committed after the state court of appeals has resolved the prisoner's first-appeal-of-right] is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error [that results in a procedural default].'" *Coleman*, 501 U.S. at 753, quoting *Carrier*, 477 U.S. at 488. "Given that a criminal defendant has no right to counsel beyond his first appeal in pursuing state discretionary or collateral review . . . any attorney error [committed during state collateral proceedings] that led to the default of Coleman's claims in state court cannot constitute cause to excuse the default in federal habeas." *Coleman*, 501 U.S. at 757.

3. Other courts of appeals have resolved the question differently. No other court of appeals has allowed an attorney error to serve as cause for a procedural default when that attorney error was committed by a new post-appeal

---

999 F.2d 425, 429-30 (9th Cir. 1993); *Hill v. Jones*, 81 F.3d 1015, 1025-26 (11th Cir. 1996), *cert. denied*, 519 U.S. 1119 (1997).

attorney *after* the state court of appeals had already resolved the prisoner's first-appeal-of-right, and likewise, no other court of appeals has allowed the errors of attorneys whom the State has always treated as post-conviction counsel to excuse a state-court procedural default. *See, e.g., Weeks v. Angelone*, 176 F.3d 249, 273 (4th Cir. 1999) ("For an attorney error to constitute cause . . . a petitioner must first possess a constitutional right to assistance of counsel, [and] . . . a petitioner has no constitutional right to assistance of counsel in state habeas proceedings."), *aff'd. on other grounds*, 120 S. Ct. 727 (2000); *Jones v. Johnson*, 171 F.3d 270, 277 (5th Cir. 1999) ("The law is well-established . . . that such error [by state post-conviction counsel] committed in a post-conviction application, where there is no constitutional right to counsel, cannot constitute cause."), *cert. denied*, 120 S. Ct. 29 (1999); *Steward v. Gilmore*, 80 F.3d 1205, 1212 (7th Cir. 1996) ("Ineffective assistance of postconviction counsel is not itself a cognizable federal constitutional violation and may not serve as cause for a procedural default."); *Rehbein v. Clarke*, 94 F.3d 478, 484 (8th Cir. 1996) ("it is now well settled that there is no constitutional right to an attorney in state postconviction proceedings. . . . [so] even if Rehbein's postconviction counsel was ineffective . . . Rehbein has failed to demonstrate adequate cause for his procedural default"); *Ortiz v. Stewart*, 149 F.3d 923, 932 (9th Cir. 1998) (rejecting claim that a procedural default was caused by the ineffective assistance of counsel in a post-conviction proceeding, because ineffective assistance can "only constitute cause if it amounts to an independent constitutional violation," and "there is no constitutional right to an attorney in a state or federal habeas proceeding"), *cert. denied*, 119 S. Ct. 1777 (1999); *Demarest v. Price*, 130 F.3d 922, 941 (10th Cir. 1997) ("ineffective assistance of counsel in the post-conviction proceedings does not constitute cause under federal law"); *Tower v. Phillips*, 7

F.3d 206, 211 (11th Cir. 1993) ("an attorney's failure to institute timely collateral proceedings cannot excuse a procedural default").

And, like the Ohio Supreme Court, which has rejected the argument that the heavy workload of a state public defender's office can excuse a prisoner's procedural default in state post-conviction proceedings, *see State v. Wilson*, 684 N.E.2d 1221, 1222 (Ohio 1997) ("[t]hat counsel was 'busy' with other cases does not constitute good cause for the delayed filing"), so federal courts have likewise dismissed that excuse as the cause for a state-court procedural default. *See Fairman v. Anderson*, 188 F.3d 635, 643 (5th Cir. 1999) (where post-conviction counsel "failed to act or otherwise inadvertently allowed deadlines to pass," the habeas petitioner "demonstrates no external impediment – necessary to show 'cause' – that prevented his counsel from constructing or raising his claims"); *Tredway v. Farley*, 35 F.3d 288, 295-96 (7th Cir. 1994) (describing the heavy-workload-as-cause excuse as "squarely foreclosed"), *cert. denied*, 513 U.S. 1129 (1995); *Bannister v. Delo*, 100 F.3d 610, 624 (8th Cir. 1996) ("post-conviction counsel's case load, which allegedly was heavy and prevented him from devoting more time to this case . . . [does] not establish[] cause"), *cert. denied*, 521 U.S. 1126 (1997).

In short, the court of appeals has departed from the uniform course set by this Court and followed by all other lower courts in the wake of *Coleman*. Though "[n]o procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it," *Coleman*, 501 U.S. at 751 (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)), that principle will now mean little

in the Sixth Circuit when the States there try to set deadlines for the "timely assertion" of ineffective-assistance claims in state court, for now whenever a prisoner misses such a deadline, he can argue that he had a "constitutionally-mandated" right to have a new post-appeal lawyer raise the claim on time for him. Such an expansive view of the Sixth Amendment right to counsel – a view so at odds with this Court's express decisions to the contrary – undercuts the States' authority to enforce their procedural rules, makes a mockery of the States' "important interest in [the] finality" of their appellate-court judgments, *Coleman*, 501 U.S. at 750, and tramples on the "concerns of comity and federalism . . . [that underlie] the independent and adequate state ground doctrine." *Id.* at 730.

4. The decision of the court of appeals will eviscerate this Court's decision in *Edwards v. Carpenter.* Just months ago, this Court held that any state prisoner who defaults on a state-court deadline for raising an ineffective-assistance-of-counsel claim in state court must show cause for and prejudice from that default before he may offer the defaulted ineffective-assistance claim itself as the cause for the state-court procedural default of some other constitutional claim. *See Edwards v. Carpenter*, 120 S. Ct. 1587, 1591-92 (2000). As the Court said in *Edwards*, that conclusion "flows irresistibly from [the Court's] precedents." *Id.* at 1592 n.3.

Yet the *Edwards* requirement that a prisoner show cause in federal habeas for an earlier state-court default of an ineffectiveness claim is now a toothless procedural barrier in the Sixth Circuit, for the court of appeals has now decreed that a prisoner *always* enjoys a federal constitutional right to a new and effective lawyer after the first-appeal-of-right is finished. That new "constitutionally mandated" lawyer will presumably never default on a State's deadline for raising an

ineffective-assistance-of-appellate-counsel claim concerning the work of the prisoner's original appellate lawyer (and if that post-appeal lawyer *does* so default, then apparently, the prisoner will have yet another Sixth Amendment ineffectiveness claim to lodge against *him*).

Under the decision below, every state prisoner can show cause for his default of an ineffective-assistance-of-appellate-counsel claim (like the claim in *Edwards*) – and so no state prisoner need ever comply with state-court deadlines for raising such a claim – because every prisoner can now blame the tardiness of his ineffective post-appeal lawyer (or blame the State's failure to provide a post-appeal lawyer in the first place) as his excuse for missing state-court deadlines for raising the ineffective-assistance claim in the State's courts. That result makes illusory the cause-and-prejudice standard applied to the defaulted ineffective-assistance claim in *Edwards*, for now *every* prisoner who similarly defaults can automatically show cause, thereby opening up for further federal habeas review a host of claims that were never "presented in the manner that state law requires." *Edwards*, 120 S. Ct. at 1592. That aberrant approach now merits review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BETTY D. MONTGOMERY
Attorney General of Ohio
EDWARD B. FOLEY*
State Solicitor
**Counsel of Record*
DAVID M. GORMLEY
Associate Solicitor

August 2000